No. 22,633

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

INTALCO ALUMINUM CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
Intervenor.

On Petition for Review and Cross-petition
for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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The National Labor Relations Board**

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the Board properly concluded that the Company violated Section 8(a)(2) and (1) of the Act by recognizing and executing a contract with the Machinists at a time when the Machinists represented only a minority of unit employees.

2. Whether the Board's reimbursement order is valid and proper.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of the Intalco Aluminum Corp. (the Company) to review and set aside an order of the National Labor Relations Board issued against the Company on February 21, 1968, pursuant to Section 10(c) of the National Labor Relations Act, as amended

(61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). In its answer, the Board has requested that its order be enforced in full. The Board's Decision and Order are reported at 169 NLRB No. 136. This Court's jurisdiction is invoked under Section 10(e) of the Act, the events having taken place at the Company's plant in Ferndale, Washington.

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Company violated Section 8(a)(2) and (1) of the Act by recognizing and entering into a contract with the Machinists[1] at a time when it was a minority union. The evidence underlying the Board's findings is detailed below.

The Company is a Delaware corporation which began construction in 1965 of an aluminum manufacturing plant in Ferndale, Washington (R. 46).[2] Starting about a month after the Company hired its first hourly rated employee in June 1965, representatives of various unions announced to management officials that they would attempt to organize the workers at the Ferndale plant (R. 46; Tr. 14, 23). Thus, during the summer of 1965 a representative of the Machinists advised the Company's manager of employment and training of its intentions to become the bargaining agent of the newly hired employees (R. 46; Tr. 29). In July and then again in November 1965, a Steelworkers[3] organizer similarly contacted the

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[1] International Association of Machinists and Aerospace Workers, AFL–CIO.

[2] "R." refers to the formal documents reproduced, pursuant to Court Rule 10, as "Volume I, Pleadings"; "Tr." refers to portions of the stenographic record, also reproduced pursuant to Rule 10. References designated "G.C. Exh."; or "Inter. Exh." are to the exhibits of the General Counsel and the Machinists respectively.

[3] United Steelworkers of America, AFL–CIO.

Company, as did a representative of the Aluminum Workers[4] in December of that year (R. 46; Tr. 19-20, 23, 25, 92-93). These unions, and a fourth labor organization, the Bellingham Trades Council,[5] subsequently began campaigns among the Company's employees. By the middle of March 1966 each of them had solicited varying numbers of signed authorization cards (Tr. 26-27, 88, 273, 557-558; G.C. Exh. 9; Inter. Exhs. 1, 3A, 4, 5, 6, 10, 13, 15, 17, 25, 26, 30, 37, 38, 39).

On March 10, 1966, the Machinists sent a letter to the Company requesting recognition and offering to prove a majority by submitting its authorization cards to a neutral third party for a card check (R. 46, 47; Tr. 37-38, 1161, 1167-1169; G.C. Exh. 2). The Company acceded to this procedure and entered into an agreement with the Machinists referring the matter to a representative from the Washington State Department of Labor and Industries (R. 47, 88; G.C. Exhs. 3, 4). The Company informed the State representative, Willard Olson, that, in addition to the Machinists, at least two other unions were then organizing, but Olson did not notify any of the other labor organizations that a card check was imminent (R. 51, 88; 1026, 1093-1094, 1097-1098).

On March 16, Olson and his assistant compared signatures on the Machinists' submitted authorization cards with signatures known to be authentic in the Company's files. Olson found, on this basis, that 81 cards were genuine. Since, in Olson's view, the Company had a representative complement of employees, 122 in number, the 81 cards were deemed to establish the majority status of the Machinists (R. 47-48, 49; G.C. Exhs. 5, 6, 7; Inter. Exh. 1). The Company then posted a notification in its plant of its recognition of the Machinists (R. 48; 315-316, 448, 488, 544-545, 581, 799-800).

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[4] Aluminum Workers International Union, AFL–CIO.

[5] Bellingham Metal Trades Council, Allied Industrial Division.

On March 18, the Aluminum Workers filed a representation petition before the Board, naming itself, the Steelworkers and the Machinists as labor organizations which had either claimed recognition from the Company, or were known by it to have a representative interest in its employees (R. 48, 49; 48; G.C. Exh. 8). Together with its petition, the Aluminum Workers filed 44 of its own authorization cards dated prior to the card check. Of these cards 30 were signed by individuals who also had signed cards for the Machinists (R. 49, 88-89; 89; G.C. Exh. 9). A provision of the Aluminum Workers' card purported to "cancel any prior authorization" (R. 49; G.C. Exh. 9). Notwithstanding the above proceedings, the Company and the Machinists, on April 14, 1966, executed a collective bargaining agreement which provided for a union security clause and dues check-off (R. 49; 177, 178; G.C. Exh. 11, p. 7 thereof).

II. THE BOARD'S CONCLUSION AND ORDER

Upon the foregoing facts, the Board found that the Company violated Section 8(a)(2) and (1) of the Act by recognizing and entering into a contract with the Machinists at a time when the Machinists did not represent a majority of the Company's employees (R. 88, 89, 52, 53). Accordingly, the Board ordered the Company to cease and desist from recognizing the Machinists and from giving effect to the contract executed with it. Affirmatively, the Board ordered the Company to withdraw and withhold all recognition from the Machinists, unless and until it is certified by the Board, to reimburse all employees for dues and other moneys extracted under the contract with the Machinists, and to post the appropriate notices (R. 89, 53-54).

ARGUMENT

I. THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(2) AND (1) OF THE ACT BY RECOGNIZING AND EXECUTING A CONTRACT WITH THE MACHINISTS AT A TIME WHEN THE MACHINISTS REPRESENTED ONLY A MINORITY OF UNIT EMPLOYEES

An employer commits an unfair labor practice by granting exclusive bargaining status to and executing a contract with a union that represents only a minority of his employees. *International Ladies' Garment Workers' Union v. N.L.R.B. (Bernard-Altmann),* 366 U. S. 731 (1961); *N.L.R.B. v. Trosch,* 321 F.2d 692, 695, 696 (C.A. 4, 1963), cert. den., 375 U. S. 993 (1964). "There could be no clearer abridgment of Section 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' . . . . " *International Ladies' Garment Workers' Union, supra,* 366 U. S. at 737. Such a violation is manifest on this record.

Prior to the time the Company extended recognition to the Machinists, a substantial number of employees had signed authorization cards not only for that union but for the other unions as well (*supra,* pp. 3, 4). It is established Board law that when an employee has signed multiple union cards, none of his cards can be considered a valid designation, for it is impossible to determine which union the employee has chosen as his *exclusive* bargaining agent. *Allied Supermarkets,* 169 NLRB No. 135, 67 LRRM 1298, 1299 (1968).[6] Had the State Mediator, who knew of the

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[6] See also *J. W. Mortell Co.,* 168 NLRB No. 80, 66 LRRM 1367 (1967); *Bendix-Westinghouse Automotive Air Brake Co.,* 161 NLRB No. 73, 63 LRRM 1395, 1396-1397 (1966); *I. Posner, Inc.,* 133 NLRB 1573, 1575 (1961); *International Metal Products Co.,* 104 NLRB 1076, 1080 (1953); *Weirton Ice & Coal Supply Co.,* 103 NLRB 810, 811-812 (1953); *Harry Stein d/b/a Ace Sample Card Co.,* 46 NLRB 129, 130-131 (1942).

organizing efforts of the Steelworkers and Aluminum Workers, notified the competing unions that he was making a card check and invited them to participate in it, he would have found that 30 of the employees who designated the Machinists as their bargaining representative subsequently designated the Aluminum Workers, and revoked their previous decisions (*supra,* p. 4).[7] The Machinists thus could not be regarded as the duly designated representative of the Company's employees within the meaning of Section 9(a) of the Act. Consequently, the effect of the Company's conduct in extending recognition to the Machinists was to establish a minority union in its plant.

A. Good faith is no defense

The Company protests that it was not aware that some employees had signed more than one authorization card, and that the demand and extension of recognition were accomplished with an absence of bad faith (Co. Br. 4). But such a circumstance cannot aid the Company: "Nothing in the statutory language prescrib[es] *scienter* as an element of the unfair labor practice here involved." *International Ladies Garment Workers Union, supra,* 366 U. S. at 739. Here, as in the *Garment Workers'* case, the employer acts at his peril, for any other rule would subject employees to imposition of a bargaining agency *not* of their own choosing. Here, too, as in *Garment Workers,* "prohibited conduct cannot be excused by a showing of good faith . . . for, even if mistakenly, the employees' rights have been invaded." *Id.* at 738-739.

The Company argues that *Garment Workers* is distinguishable here because, in the instant case, the Company employed a "satisfactory", "reasonable" or "careful" method of determining majority status (Co. Br. 24). This argument fails for two separate reasons. First, the Supreme Court

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[7] The Mediator found that 81 out of 122 employees had signed cards for the Machinists (*supra,* p. 3). If, therefore, 30 of these cards are rejected, the Machinists failed to obtain a majority.

made it explicit that the degree of care exhibited by the employer is irrelevant. Noting that the employer in *Garment Workers* made "no reasonable effort to determine" the union's status, the Court stated that this was "*of no significance to our holding*". *Id.* at 739, n. 11 (emphasis supplied.) Second, *Garment Workers* hardly suggests that the Company's conduct here was satisfactory or reasonable in any event. It is true that the Court found it less than an "onerous burden" for employers to cross-check their records with union listings or cards. But nothing in *Garment Workers* implies that an employer would be behaving reasonably if he checked the cards of only one union in a rival union situation. Accordingly, even if some exception to the *Garment Workers* rule were to be created exonerating an employer's recognition of a minority union, the facts of this case do not present a situation which invites such a result.

To support its contrary position, the Company (Br. 13) cites *West Indian Co., Ltd.*, 129 NLRB 1203 (1961), for the proposition that state labor agency determinations have previously been given binding effect by the Board. Therefore, the Company argues, the Board should defer to the State's determination, despite its discrepancies, thus sanctioning the Company's recognition of the Machinists. But *West Indian* involved a secret ballot election in which the employees were "given an opportunity to express their true desires as to a collective bargaining agent, and [which] was not attended by irregularities". 129 NLRB 1204. In those circumstances, the Board held that full effect would be given to the State certification and that the employer could not properly insist upon a subsequent Board election.[8]

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[8] See *Retail Clerks Local No. 1179 v. N.L.R.B.*, 376 F.2d 186, 190 (C.A. 9, 1967):

> ". . . unless an employer was motivated by a good faith doubt that the union represented a majority of the employees, it was an unfair labor practice for the employer to demand a Board election before negotiating with the union."

In the instant case, however, there was no election at all; *West Indian* and other related cases relied upon by the Company (Br. 13) are therefore inapplicable. Moreover, the card check conducted was attended by such an irregularity – the exclusion of competing unions – that it obviously constitutes an inadequate procedure and fails to satisfy the minimal standards of trustworthiness referred to in *West Indian* in connection with elections. For example, the Board has never held that *West Indian* would apply to a state election in which only one of several competing unions was allowed on the ballot. The State card check in this case suffers from analogous defects.

Accordingly, this case does not fairly present the question posed by the Company: whether the Board should refrain from re-examining the Machinists' claim of majority status, and from applying *Garment Workers,* because of the desirability of giving binding effect to a state agency's determination of majority status. That determination, in the Board's view, was characterized by a substantial deviation from fundamental requirements of fairness, and does not invite Board sanction. As the Board here explained:

> "In these circumstances, we agree with the Trial Examiner that at the time of recognition a question concerning representation existed and that the investigation and resolution of that question was not attended by appropriate safeguards, and we find that Respondent acted at its peril . . . (R. 88).

B. Arguments against the Midwest Piping doctrine are misplaced

The Company argues at length (Br. 8-14) that the *Midwest Piping* rule (*Midwest Piping & Supply Co.,* 63 NLRB 1060 (1945)) is inapplicable here. But the Board did not refer to that doctrine, either in terms or by case citation. Nor did the Board find that there were competing claims

for recognition at the time the Company acted, a finding that traditionally has constituted the prerequisite for a *Midwest Piping* application. See *Retail Clerks Local 770 v. N.L.R.B.*, 370 F.2d 205, 207 (C.A. 9, 1966).

The sole expressed basis for the Company's claim that the Board here invoked *Midwest Piping* consists in the fact that the Board's decision contains the statement that appropriate safeguards were not employed in resolving the question of representation (Co. Br. 8). But as we have already shown, *infra*, pp. 7-8, this Board finding was appropriate to distinguish the instant case from *West Indian, supra,* and others where state action was given final binding effect. No reason exists therefore, to infer a *Midwest Piping* case from this language, except to create a vulnerable target for Company counsel.

C. Other cases cited by the Company are inapplicable

The other cases relied upon by the Company are inapplicable because they did not involve minority unions. *Snow v. N.L.R.B.*, 308 F.2d 687 (C.A. 9, 1962); and *Retail Clerks Union Local 1179 v. N.L.R.B.*, 376 F.2d 186 (C.A. 9, 1967) discuss an employer's obligations under Section 8(a)(5) of the Act and the conditions under which he may lawfully decline to bargain with a *majority* union. The instant case, however, involves the employer's duty under Section 8(a)(2) to refrain from recognizing a *minority* union. The act of recognition, no matter how well motivated, violates employee rights unless the union in fact has the support of a majority of the employees; and a mere "good faith" belief on the employer's part cannot supply that majority if it does not exist. *Garment Workers, supra.*

That "good faith doubt" creates a defense in Section 8(a)(5) cases, while "good faith belief" is *no* defense in Section 8(a)(2) cases does not,

as the Company argues (Br. 16), offend "fundamental fairness". Where the factual circumstances confirm or support the Union's truthful claim of a majority, an employer must recognize the union to avoid a Section 8(a)(5) charge; where the circumstances genuinely cast doubt upon its claim the employer must refrain pursuant to Section 8(a)(2). But in each case, as the Supreme Court pointed out in *Garment Workers,* it will not be an "onerous burden" for the employer to take the steps appropriate to confirm the union's claim or find it doubtful. Plainly, those minimal steps were not taken here: the Company relied on a procedure which failed to provide for the participation of the competing unions and which consequently failed to check for the revocations and duplications which had occurred.

II. THE BOARD'S REIMBURSEMENT ORDER IS VALID AND PROPER

Under Section 10(c) of the Act, the Board "is charged with an extremely broad latitude in fashioning remedies to effectuate the purposes of the Act as a whole. [citation omitted] Whenever possible the Board's order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act'." *N.L.R.B. v. Seine & Line Fishermen's Union (Paul Biazevich),* 374 F.2d 974, 982-983 (C.A. 9, 1967), cert. den., 389 U.S. 913, quoting *Virginia Electric & Power Co. v. N.L.R.B.,* 319 U.S. 533, 540 (1943). Because of the union-security and dues checkoff provisions in the contract between the Company and the Machinists (*supra,* p. 4), the Company's employees were compelled, as the price of keeping their jobs, to join and pay dues and fees to the Machinists. Since, as we have shown above, these contractual obligations were unlawfully imposed, the Board should clearly

be entitled to compel their undoing. Similarly, that aspect of the Board's order which requires repayment of the sums unlawfully exacted from the employees pursuant to the contract is a wholly appropriate remedy for the unfair labor practice committed by the Company. *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U. S. 533 (1943); *Dixie Bedding Mfg. Co. v. N.L.R.B.*, 268 F.2d 901, 907 (C.A. 5, 1959); *Local Lodge 1424, IAM v. N.L.R.B.*, 264 F.2d 575, 582 (C.A.D.C., 1959), *rev'd on other grounds,* 362 U.S. 411 (1960); *N.L.R.B. v. Downtown Bakery Corp.*, 330 F.2d 921, 928 (C.A. 6, 1964); *N.L.R.B. v. Spiewak,* 179 F.2d 695, 698 (C.A. 3, 1950); *Revere Copper & Brass, Inc. v. N.L.R.B.*, 324 F.2d 132, 137 (C.A. 7, 1963); *N.L.R.B. v. Local 294, IBT, etc.,* 279 F.2d 83, 87-88 (C.A. 2, 1960), cert. den., 364 U.S. 894 (1960); *N.L.R.B. v. Burke Oldsmobile, Inc.*, 288 F.2d 14, 16-17 (C.A. 2, 1961).[9]

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[9] To the extent that *Hughes & Hatcher, Inc. v. N.L.R.B.,* 393 F.2d 557, (C.A. 6, 1968) finds "no reason" for an employer to make reimbursement when it acted "merely as a conduit" for the dues, the decision is erroneous. See *Virginia Electric, supra,* 319 U.S. 542-544.

Nor may the Company argue that *Garment Workers* demonstrates Supreme Court disapproval for such a remedy, thus, in effect, overruling *Virginia Electric*. In fact, reimbursement was not an issue in *Garment Workers*, because the Board did not direct such a remedy there.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition to review should be denied and that a decree should issue enforcing the Board's order in full.

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